LIBRARY
SUPREME COURT, U. S.

70-350

Supreme Court, U.S.
FILED
JUN 28 1971
E. ROBERT SEAVER, CLERK

In The

Supreme Court of the United States

October Term, 1971

No. 1 897

DONALD PAUL EASTER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

MOTION FOR WAIVER OF TIME UNDER RULE 22-2

and

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MARTIN R. DUNN
427 Fleming Building
Des Moines, Iowa 50309
Telephone: 288-2213
Attorney for Petitioner

COCKLE PRINTING COMPANY, 1822 St. Mary's Avenue, Omaha

INDEX

	Page
Citations to Opinions Below	5
Jurisdiction	5
Question Presented	5
Statute Involved	5
Statement of the Case	5
Reasons for Granting the Writ	7
Conclusion	7
Appendix:	
Court of Appeals Opinion	8

TABLE OF AUTHORITIES

CASES:

Kann v. United States, 323 U. S. 88, 65 S. Ct. 148 (1944)	5, 7, 12
Schacht v. U. S., (Texas 1970) 90 S. Ct. 1555, 398 U. S. 58, 26 L. Ed. 2d 44	2, 3

STATUTES:

28 U. S. C. 1254 (1)	5

In The

Supreme Court of the United States

October Term, 1971

No. .....

DONALD PAUL EASTER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

MOTION FOR WAIVER OF TIME UNDER RULE 22-2
and
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR WAIVER OF TIME UNDER RULE 22-2 OF THE SUPREME COURT RULES

COMES NOW your petitioner and prays that the Court waive the requirement under Supreme Court Rule 22-2, that a petition for writ of certiorari to review the judgment of a Court of Appeals in a criminal case shall

be deemed in time where it is filed with the clerk within 30 days after the entry of the judgment for the following reasons:

1. Your petitioner instructed his counsel that handled his appeal in the Court of Appeals to take all the necessary steps to appeal his case to the Supreme Court of the United States in the event of an adverse ruling in the Court of Appeals for the Eighth Circuit.

2. Your petitioner was not advised of the adverse judgment of the United States Court of Appeals until more than 30 days after judgment had been rendered.

3. Your petitioner wishes to exercise his right to petition for review on certiorari.

Wherefore your petitioner respectfully requests this Honorable C[redacted] to waive the requirement under Rule 22-2 of the Supreme Court Rules that a petition for writ of certiorari to review the judgment herein within 30 days be waived.

AUTHORITY

The facts as set forth in the petitioner's motion are similar to those in the case of *Schacht v. The United States*, (Texas 1970) 90 S. Ct. 1555, 398 U. S. 58, 26

L. Ed. 2d 44, wherein this Honorable Court stated in essence that where a petition for writ of certiorari was filed accompanied by a motion to waive the 30 day requirement, in spite of the fact that the petition was filed some 101 days after the appropriate period for filing had expired where the affidavits filed with the motion were not denied or challenged by the Government, and where the petitioner had acted in good faith and that the delay in filing was brought about by circumstances largely beyond the petitioner's control that the Supreme Court had jurisdiction to consider the petition for writ of certiorari.

Your petitioner respectfully submits that his case is similar to *Schacht*, supra, and that the Supreme Court should waive the 30 day requirement under Rule 22-2.

Respectfully submitted,

MARTIN R. DUNN
427 Fleming Building
Des Moines, Iowa 50309
Attorney for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

—o—

October Term, 1971

No. .....

—o—

DONALD PAUL EASTER,

Petitioner.

vs.

THE UNITED STATES OF AMERICA,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

Petitioner prays that a writ of certiorari issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on April 15, 1971.

—o—

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals sustains the judgment of the District Court and is printed in the Appendix.

———o———

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered April 15, 1971. The jurisdiction of the Court is invoked under 28 U. S. C. 1254(1).

———o———

QUESTION PRESENTED

Does this case fall within the Rule of Law enunciated in *Kann v. U. S.*, 323 U. S. 88, 65 S. Ct. 148 (1944)?

———o———

STATEMENT OF THE CASE

The defendant, Donald Paul Easter, of Tiffin, Georgia, was indicted on the 19th day of February, 1970, by the United States Grand Jury for the Southern District of Iowa, of committing the crime of mail fraud and violation of Title 18, United States Code, Section 1341.

The indictment contained seventeen counts of inducing persons to enter into incorporation pre-subscrip-

tion agreements to purchase stock in a corporation known as Educational Investment Corporation, knowing the pretentious representations were falsely made and was a scheme in artifice designed to obtain money fraudulently.

On the 30th day of March, 1970, the defendant entered a plea of not guilty to each count whereupon trial was commenced on the 18th day of May, 1970, the matter was submitted to the jury with a verdict of guilty returned on the 22nd day of May, 1970, on all counts submitted, which was thirteen counts.

The defendant was sentenced on the 17th day of June, 1970, receiving a sentence of five years imprisonment on each count and each count to run concurrently. Thereafter, a notice of appeal was filed on the 22nd day of June, 1970, and this matter was submitted to the United States Court of Appeals for the Eighth Circuit after appropriate and timely notices of appeal were filed.

The Honorable William C. Hanson, Judge, Southern District of Iowa, was the judge at all times during the trial from arraignment through sentencing. No portion of any matters of the Lower Court proceedings have been reported in the Federal Supplement.

On the 15th day of April, 1971, in the United States Court of Appeals for the Eighth Circuit, the judgment was affirmed before Matthes, Chief Judge, Mr. Justice Clark, and Bright, Circuit Judge; Associate Justice Clark sitting by special designation having written the opinion.

———o———

REASONS FOR GRANTING THE WRIT

Ceriorari should be granted because the Court of Appeals in affirming the District Court judgment has rendered a decision in conflict with a decision of the United States Supreme Court.

In the Court of Appeals your petitioner raised the issue that in the indictment there were allegations that a part of the mailings that were alleged to be a part of the fraud and scheme included the mailing of checks to drawees by the bank where the check had been deposited.

The Circuit Court of Appeals held that there were other mailings which would take the case out of the rule in *Kann* placing it clearly within the exception noted on p. 94 of *Kann*. Moreover, even though the rule announced in *Kann* did apply, this would only affect three of the counts and since the sentences were concurrent the result would remain unchanged.

Petitioner contends that the checks cashed and mailed to drawees' bank was a substantial part of the Government's case and the Circuit Court opinion is in conflict with *Kann*.

———o———

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

MARTIN R. DUNN
427 Fleming Building
Des Moines, Iowa 50309
Attorney for Petitioner

June 18, 1971

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

o

No. 20,464

o

DONALD PAUL EASTER,

Appellant.

vs.

THE UNITED STATES OF AMERICA,

Appellee.

o

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

o

(April 15, 1971)

Before MATTHES, Chief Judge, MR. JUSTICE CLARK*, and BRIGHT, Circuit Judge.

CLARK, Associate Justice.

The appellant, Donald Paul Easter, has been found guilty by a jury on 13 counts of mail fraud, in violation

---

* The Honorable Tom C. Clark, retired Associate Justice of the United States Supreme Court, sitting by special designation.

of 18 U. S. C. Sec. 1341.[1] On this appeal he contends that the evidence was insufficient to show a scheme to defraud; that the mailings were not shown to have been part of or in execution of the scheme; that certain counts are based on mailings subsequent to the receipt of the fruits of the fraud; and that an instruction on circumstantial evidence was erroneous, and another instruction on Iowa Law took factual issues from the jury, denying appellant due process. We find no merit in any of the contentions and affirm the judgment.

1. The evidence is clear and convincing that appellant devised a scheme to defraud and obtain money by false pretenses, representations and promises and that he used the United States mail to execute the same. The gist of the offense is that appellant personally solicited funds from around two hundred people on a pre-subscription agreement to purchase stock in a corporation to be sub-

---

1 The mail fraud statute, 18 U. S. C. Sec. 1341, provides as follows:

"Whoever, having devised or intending to devise any scheme of artifice to defraud, or for obtaining money or property by means of false or fraudulent, pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be, or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

sequently organized and to be known as Educational Investment Corporation. He represented that the corporation would earn high returns on the purchase of contracts of students with educational institutions, correspondence schools etc.; that the corporation would be organized when $100,000 had been raised; and that appellant was to receive up to 20 percent organizing fees. In his plan of operation appellant called on Elmer Bergantzel, a 30-year resident farmer of the community, whom he had met through the minister of the Christian Church. Bergantzel was made acting vice president of E. I. C. by appellant and was induced to subscribe with his wife to shares of stock. Appellant advised them that a charter would be secured when $100,000 was raised and that the corporation should earn interest up to 40 percent.[2] In addition, appellant employed Mrs. Bergantzel as his bookkeeper and having decided that there should be two signatures to the corporate checking accounts, induced Bergantzel to be a co-signer with appellant. He also secured a list of "investment conscious" friends whom Bergantzel recommended for solicitation. Appellant subsequently solicited these people—farmers, laborers, wage earners of both sexes and all ages. As he would secure a subscription—a post dated check or other payment—he would have the subscriber sign a subscription list and also se-

---

2 Other witnesses testified as to the earnings appellant represented they would make on the E. I. C. stock: "around 11 percent"; "your money would probably triple in about two to three years"; "exceeded anything we could get on money which we had in a savings and loan account"; "somewhere around 30-35 percent"; "18 percent per year"; "well, about 35-36 percent"; "as high as 35 percent"; "maybe up to 40%".

cure a list of friends to solicit. The sales pitch appeared to be a reference to who had recommended the prospect, the exhibition of the signed subscription list that appellant carried with him and a sales talk as to earnings, etc. Within slightly over a year appellant had secured $102,000 of subscriptions. However, $25,000 had reneged either on their post-dated checks or subscription which left a total of $77,000 in cash that was collected. The money—for the most part—was deposited in banks or savings and loan associations. On three occasions it appears that appellant cashed the checks at the bank and received the money himself. These are covered by Counts I, VIII and XVII. No corporate charter was ever applied for by the appellant nor did one ever issue for the E. I. C. On the other hand, the appellant changed the original target amount for a charter from $100,000 to $200,000 without even advising the previous subscribers. In addition, appellant had induced Bergantzel to sign series of blank checks and to sign blank bank and loan association signature cards which permitted appellant to withdraw funds on his sole signature. This appellant did. In fact one exhibit indicates that appellant planned at the inception to take $30,000 personally in promotion fees during the first year and to pay an item marked "Folks debt" of $5000 to his parents on April 15, 1966. The evidence is that he personally drew over $34,000 from the accounts during the period of some 15 months. Checks to himself and marked "promotion fee" totaled $21,000, $6474.96 were marked "commissions" and over $5000 for "expenses". We find the evidence overwhelming that from its very inception the appellant devised a scheme to de-

fraud and successfully carried it out. See *Glasser v. United States*, 315 U. S. 60 (1942); *Kayser v. United States*, 394 F. 2d 601 (8 C. A. 1968); *Latham v. United States*, 407 F. 2d 1 (8 C. A. 1969).

2. The evidence is also clear and abundant that the mails were used to execute the scheme. On all of the counts save three the checks were deposited to the corporate account and cleared by mailing to other banks. See *Pereira v. United States*, 347 U. S. 1 (1954). In addition, the appellant followed a course of conduct, traditional to mail fraud, of writing "lulling letters" to his victims. Typical letters advised the addressee: "We have made fine progress . . . we have raised $81,000. . . . In time you will discover that you have made a very wise investment. Your check for $500 (100 shares) will be deposited on 6-1-66." At no time had $81,000 been raised. Another letter—practically identical—*except* the amount raised was represented as $140,000—covered 200 shares. And still another letter of the same type represented that "we have raised $160,000." It covered 50 shares. These mailings take the case out of the rule of *Kann v. United States*, 323 U. S. 88 (1944), placing it clearly within the exceptions there noted at p. 94. Moreover, even though the rule announced in *Kann* did apply, this would only affect three of the counts and since the sentences were concurrent the result would remain unchanged. See *United States v. Sheehan*, 428 F. 2d 80 (8 C. A. 1970).

3. Nor is there merit in the attack on the circumstantial evidence charge (Instruction No. 5). See *Holland v. United States*, 348 U. S. 121 (1954) at 140; *United States*

v. Kye, 411 F. 2d 120 (8 C. A. 1969). Indeed, if there were it would be harmless in view of the abundance of direct proof.

4. Finally, the appellant objects to Instruction No. 7 as to Iowa Law. It was entirely proper. Appellant had admitted to pleading guilty to a charge of selling securities to more than 25 persons without complying with Iowa law and was fined $500.00. The court merely took judicial notice of Iowa law with reference to pre-incorporation agreements and the maximum commissions and expenses permitted i. e. 20%. The testimony had shown payments to appellant of almost 50% of the cash received and over 1/3 of the total subscriptions. We note that the learned trial judge carefully explained that no charge was made here of a violation of Iowa law but that the instruction was given only if the jury found it relevant as to representation made by appellant to prospective subscribers.

The judgment is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-350

DONALD PAUL EASTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Iowa, petitioner was convicted on thirteen counts of mail fraud in violation of 18 U.S.C. 1341.[1] He was sentenced to concurrent five-year prison terms. The court of appeals affirmed (Pet. App. A).[2]

The relevant facts are stated in the opinion of the court of appeals (Pet. App. 9–12). Petitioner solicited funds from numerous persons on a pre-subscription

[1] Four additional counts were dismissed by the trial court at the close of the government's case. See the printed appendix in the court of appeals ("App."), which we are lodging with the Clerk of this Court.

[2] The judgment of the court of appeals was entered on April 15, 1971. The petition for a writ of certiorari was filed on June 28, 1971, and is out of time under Rule 22(2).

440-193—71

agreement to purchase stock in "Educational Investment Corporation." He represented to those solicited that E.I.C. would achieve a high return on investment by purchasing contracts between educational institutions and students. Petitioner told some prospective investors that they would realize a return as high as 40 percent; he told others 30–35 percent; still others 11 percent. Petitioner initially indicated to subscribers that the corporation would be organized when $100,000 had been raised. He later raised the target amount to $200,000 without advising previous subscribers of this upward revision. Subscribers signed a subscription list and furnished petitioner with names of friends to solicit. In fifteen months petitioner collected $77,000, most of which he deposited in accounts in banks and savings and loan associations. During the same period he personally withdrew more than $34,000 from these accounts by means of checks drawn to himself and marked "promotion fees," "commissions" and "expenses." Petitioner wrote "lulling" letters to subscribers. A typical letter informed the recipient:

> "We have made fine progress * * * we have raised $81,000 * * *. In time you will discover that you have made a very wise investment. * * *"

At no time was $81,000 ever raised. In letters to other subscribers petitioner represented that he had raised $140,000 and $160,000. Petitioner never organized E.I.C. and made no application for a corporate charter.

The thirteen counts of mail fraud under which petitioner was convicted each involved a different subscriber to E.I.C. stock.[3] Petitioner raises no issue as to eleven counts which alleged that in furtherance of his fraudulent scheme he sent subscribers lulling letters through the mails. Since these counts alone support the sentence, the court of appeals was justified, as a matter of judicial convenience, in ruling that the counts under attack would not affect the judgment. *Benton* v. *Maryland,* 395 U.S. 784, 791.

In any event petitioner's attack on the two remaining counts is without merit. Count I concerned a check in the amount of $1,000 which, as reflected in the record, was payable to E.I.C. and drawn by one Lilly Cooper on the Cumberland Savings Bank of Cumberland, Iowa (App. 115). Petitioner cashed this check on April 6, 1966, at the State Savings Bank of Council Bluffs, Iowa. It cleared by mail through the Federal Reserve Bank of Chicago (App. 116). Count VIII involved a check in the amount of $1,000 payable to E.I.C. drawn by one Warren Tibbles on the Council Bluffs Savings Bank of Council Bluffs, Iowa. Petitioner cashed this check on August 23, 1966, and the drawee bank returned the cancelled check to Mr. Tibbles by mail (App. 211–213).

Where one does an act knowing that the use of the mails will follow in the ordinary course of business, he "causes" the mails to be used. *Pereira* v. *United States,* 347 U.S. 1, 8–9. See also *United States* v. *Kenofskey,* 243 U.S. 440. When petitioner cashed the

[3] The indictment is set out at App. 4–19.

checks he received from his victims, he had strong reason to expect that those checks would subsequently be sent through the mails, either during the process of clearing or when they were returned to the drawer after being cancelled by the drawee bank.

Relying on *Kann* v. *United States,* 323 U.S. 88, petitioner argues that, even though he caused the checks to be mailed, they were not mailed for the purpose of executing a fraudulent scheme within the meaning of 18 U.S.C. 1341 since he had received the proceeds of the check before the mailing. Unlike the situation in *Kann,* petitioner's scheme did not end with the cashing of the checks; petitioner continued to write lulling letters, make withdrawals from accounts, and use subscribers as references in further solicitations. See *United States* v. *Sampson,* 371 U.S. 75.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
FREDERICK W. READ III,
Attorneys.

JULY 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971